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No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1962

JOE QUONG, JOE WING WAH AND JOE WING FONG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions in the court of appeals (Pet. App. 1a–16a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1962 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 30, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners were charged with and convicted of conspiracy to import and importation of "Chinese

type drugs" located outside the United States, in violation of the Foreign Assets Control Regulations, 31 C.F.R. 500.204, issued pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 5(b).

The questions presented are:

1. Whether Section 500.204 of the Foreign Assets Control Regulations, insofar as it regulates importation of Chinese-type drugs "outside the United States" without regard to whether "any foreign country or a national thereof" has an interest in such drugs, is void as in excess of the statutory authority conferred by Section 5(b) of the Trading with the Enemy Act.

2. Whether the term "Drugs, Chinese type," as used in Section 500.204 is unconstitutionally vague, thereby rendering the regulation void.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the appendix, *infra*, pp. 13-14.

STATEMENT

After a trial by jury, the three petitioners, Quong, Wah and Fong were convicted of charges in Count I of a thirteen-count indictment that they had conspired, *inter alia*, "To purchase, transport, import or otherwise deal in or engage in any transaction with respect to * * * Chinese-type drugs, outside of the United States, without such transactions being specifically authorized * * *," in violation of the Trading with the Enemy Act, 50 U.S.C. App. 5(b), and the Foreign Assets Control Regulations issued thereunder, 31

C.F.R. 500.101, *et seq.* (App. 4a–10a).[1] Petitioner Quong was convicted of charges in Counts VII and VIII of having engaged in two separate transactions for the purchase of Chinese-type drugs located outside the United States (App. 18a–19a); petitioner Wah was convicted of similar substantive violations of the Act and the Foreign Assets Control Regulations in Counts VI and IX (App. 17a, 19a).

Petitioners Quong and Wah each received a sentence of 5 years under Count I charging conspiracy, and concurrent sentences of ten years on each of the two substantive counts under which they were convicted, the ten-year sentences to run concurrently with the five-year sentence under the conspiracy count. Quong was also fined $15,000 and Wah $5,000 (App. 173a–176a). Petitioner Fong was sentenced to five years imprisonment and a fine of $5,000 under Count I (App. 177a–178a). The Court of Appeals for the Sixth Circuit (Judge O'Sullivan concurring) affirmed each of these convictions and sentences (Pet. App. 1a–15a; 16a).

The facts, insofar as pertinent to the issues raised in the petition, may be summarized as follows: During the period of the conspiracy, November 1956 through September 1958 (App. 167b, 181b–182b, 226b), petitioners, along with others, engaged in the

[1] Petitioners' appendix in the court of appeals, now on file with the Clerk of this Court, will be cited herein as "App." plus the page reference followed by the letter "a." Respondent's appendix in the court of appeals, also on file in this Court, will be cited as "App." plus the page reference followed by the letter "b."

business of importing from overseas and selling throughout the United States by mail substantial quantities of herbs and other natural products traditionally used in the Chinese community as home remedies for the treatment of diseases (e.g., App. 122b–128b, 142b–155b, 161b–167b). These Chinese-type drugs were imported at Vancouver, British Columbia, and shipped by the Canadian importers to points in Ontario, Canada, where they were relabelled for delivery to petitioners (who were operating under various aliases) (e.g., App. 147b–155b, 173b–175b, 320b–325b). The drugs were then moved by clandestine means—in the false-front of a tractor-trailer or the false gas tank of a half-ton truck—to warehouses in Niagara Falls, New York, or Detroit, Michigan, and from there to petitioners' warehouses in Chicago, Illinois, and Memphis, Tennessee (App. 151b–155b, 161b–167b). From their warehouses in Memphis and Chicago, petitioners, again using aliases, would fill orders for this merchandise which they received in response to price lists circulated to retail dealers in Chinese herbs and home remedies (e.g., App. 196b–197b, 226b–229b).

Petitioners moved a large volume of merchandise. The records of the various shippers and warehouses show that during the period of the conspiracy petitioners received a total of 32 shipments, comprising 1,863 parcels and weighing 124,2[illegible] pounds, at their warehouse at Memphis (App. 398b–401b). During the more limited period January 1957 to September 1958, petitioners made at least 482 shipments of

Chinese merchandise, totaling 2,441 parcels, from their warehouses to retailers all over the United States (App. 181b–185b, 191b–198b, 203b–204b, 211b, 416b–420b). Records of the companies which imported the merchandise at Vancouver indicated extensive dealings with petitioner Fong in Chicago and Quong in Memphis (App. 306b–309b, 312b–318b, 414b–416b). They disclosed that during the period of the conspiracy petitioners had issued through various banks in the United States 80 checks and drafts totaling $111,723.77 (App. 397b–398b) with a substantial proportion drawn to the Vancouver importers. The checks and drafts sent to these importers were subsequently reissued by banks in Vancouver and, according to their endorsements, cashed in Hong Kong (App. 117b–121b, 402b–408b).

Petitioners were receiving and selling by means of these shipments herbs and drugs of types which originate from mainland China or Hong Kong and are traditionally used in the Chinese community for treatment of medical diseases. This was testified to by a witness who was part of the Canadian network by which the goods were transported from Vancouver across to the United States (App. 148b–158b) and by a customer who purchased the merchandise from petitioners in this country (App. 227b, 233b–240b). The latter, a dealer in Chinese drugs and herbs in San Francisco, testified that in 1956 he had received a circular from petitioner Quong which offered for sale various traditional Chinese medical home remedies (App. 222b–223b, 227b). Since the Foreign Assets Control Regulations had closed off his previous

sources of supply for these goods and preceded his importing them himself (App. 224b, 230b),[2] he had commenced ordering such merchandise from petitioners (App. 226b–227b). He estimated that thereafter he ordered and received shipments of over one hundred different medical preparations from petitioner Quong (App. 227b, 230b, 231b, 267b, 271b). He testified that the goods he received traditionally came from mainland China and that Chinese lettering on the outside of the packages indicated that they were from either mainland China or from Hong Kong (App. 233b–248b, 253b–259b, 265b, 269b). He had in the courtroom a number of packages of this merchandise and identified each package, giving the Chinese name of the drug and the ailment for which it was used (App. 240b–266b). Other witnesses, including a professor of pharmacology called on behalf of the petitioners, and a United States Customs official, testified that at least half the products included on petitioners' circulars constituted Chinese-type drugs (App. 369b–370b, 457b–458b).

Goods seized in September 1958 by a customs official from the Chicago business offices used by petitioner Fong included several types of medicinal wines marked "For Chinese Only," Lotus Roots Powder made in Hong Kong, "Red Laxative Pills," and other remedies marked "Made in Canton" (App. 331b–336b).

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[2] The witness testified that he had applied for a license to import Chinese-type drugs but that his application had been denied (App. 230b).

ARGUMENT

1. Section 500.204(a)(2) of the Foreign Assets Control Regulations is a reasonable exercise of the powers conferred on the President by Section 5(b)(1) of the Trading with the Enemy Act. Petitioners' contention that the failure to restrict this regulation to property in which a foreign country or a national thereof has an interest renders it void presents no question warranting review by this Court.

Section 5(b)(1) of the Act, *infra*, pp. 13–14, is a broad grant of power. It authorizes the President or his designate, during war or national emergency, "by means of instructions, licenses, or otherwise" to

> * * * investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, * * * transfer, * * * importation, * * * dealing in, * * * or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person * * * subject to the jurisdiction of the United States * * *.

As a means of carrying out this mandate, Section 5(b)(1) further empowers the President to require any person to furnish under oath complete information "relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may otherwise be necessary to enforce the provisions of this [subsection]."

On December 16, 1950, during the Korean Conflict, the President declared a national emergency (Proc. No. 2914, 64 Stat. A454, 15 F.R. 9029). On Decem-

ber 19, 1950, the Secretary of the Treasury, to whom power to implement the Act had been delegated under Executive Order 9193 (7 F.R. 5205, 5206), promulgated and issued the Foreign Assets Control Regulations which prohibit any dealings by persons subject to the jurisdiction of the United States in any manner, direct or indirect, with Communist China (31 C.F.R. 500.101, *et seq.*). Included among these regulations was Section 500.204 which provides that except as specifically authorized by means of rulings, licenses, or otherwise, no person subject to the jurisdiction of the United States may import or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is "Drugs, Chinese type" and other enumerated items.

The scope of Section 500.204(a)(2)—its regulation of dealings in specified merchandise located outside the United States—is a reasonable and necessary means of insuring that goods in which Communist China or its nationals have an interest do not enter the United States. Thus, the Foreign Assets Control Regulations, 31 C.F.R. 500.204(a)(1), exclude from the United States, except where specially authorized, goods which have their origin in that country. However, because the origin of goods can be masked and is, in any event, often difficult to detect (App. 8b–9b), the limited reach of 500.204(a)(1) is not enough to insure the desired exclusion. To achieve this, Section 500.204(a)(2) requires persons dealing in products typically originating in China to obtain a license or

other authorization for any such transactions. This affords the government an opportunity, in advance of importation of the goods, to make the "investigation" authorized by the Trading with the Enemy Act (50 U.S.C. App. 5(b)) and to determine whether in fact the goods originated in China. If, in the course of this screening process, the prohibited foreign interest is found, the transaction can be prohibited in accordance with the Trading with the Enemy Act. This provision of the Act for "investigation" provides ample authority for Section 500.204(a)(2) insofar as it requires advance authorization of transactions involving property which typically originates in China.

Other provisions of the Trading with the Enemy Act also require rejection of petitioners' contention that the powers it confers limit the scope of permissible regulations to property in which a foreign country or national thereof has an interest. The statute gives specific recognition to the President's need for broad enforcement powers and grants them in terms sufficient to cover the regulation at issue here. It provides that the President may require any person to furnish under oath complete information "relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this [subsection]" (50 U.S.C. App. 5(b)(1), *infra*, p. 13–14). The requirement that all importers of "Drugs, Chinese type" apply for a licence or other authoriza-

tion to deal in these products outside the United States falls well within these reporting powers conferred by Section 5(b)(1) of the Act as a means of enforcing the exclusionary bar of that statute now invoked against the products of Communist China by the Foreign Assets Control Regulations.

2. There is no substance to petitioners' remaining contention that the term "Drugs, Chinese type," as used in Section 500.204, is too vague and indefinite to support a criminal conviction (Pet. 16–25). The phraseology is not unique to this one category of products. It is used elsewhere in the regulation to describe "Beverages, Chinese type," "Tea, Chinese type;" "Carpet wool, Tibetan and Nepalese types," "Foodstuffs, Chinese type," etc.

Section 500.204 is promulgated for the regulation of the commercial activities of persons engaged in the business of importing merchandise located outside the United States. It may be assumed that the members of this limited class are experienced in the meaning of terms used in importing regulations and aware of the customs of the business community which give them content. The term is not confusing, as the petition suggests, and is reasonably understood to have the meaning ascribed to it by the Court in its instruction to the jury (App. 140a):

> * * * They are "Chinese type drugs", the Court instructs you, if they are typically and principally used by persons of Chinese nationality and are given common acceptance by Chinese people. The term, you understand,

> refers to herbs and other natural products which have a history of use in China and which are native to that country.

As shown in the statement, *supra*, pp. 5–6, the class of products covered by the category "Chinese type drugs" was well understood by merchants and others in the Chinese community to prohibit importation of drugs and herbs of the type in which petitioners were dealing. The application of the statute to the merchandise imported by the petitioners appears to have been clear to them as is indicated by the secrecy—aliases, false-fronted trucks, fictitious names—with which they conducted their operations. The jury was charged that a finding of guilt required a knowing violation of the rules governing transactions with respect to Chinese type drugs, and so found. Commenting on the evidence, the court of appeals stated (Pet. App. 7a):

> From the proof, it is quite evident that Chinese people, including these appellants, and anyone else interested in dealing in such commodities, well knew the meaning of the term "Chinese-type drugs" when it appeared in the Regulation. Obviously the appellants knew what these words meant when advised of the charge in the indictment.

Under the circumstances, the term "Drugs, Chinese type," as used in Section 500.204(a)(2), falls well within the rule that a statute or regulation employing words or phrases having a technical or other special meaning well enough known to enable those within its reach to apply them correctly is valid. *Connally*

v. *General Construction Co.*, 269 U.S. 385, 391; *McGowan* v. *Maryland*, 366 U.S. 420, 428–429. See also *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348; *Naumu* v. *Territory of Hawaii*, 273 F. 2d 568 (C.A. 9). The holding of the court in *McGowan* is a complete answer to petitioners' contentions here. There it was charged that provisions of a Maryland statute describing articles which could be sold on Sunday were unconstitutionally vague. The court rejected this contention and affirmed a criminal conviction for violation of the law, stating (366 U.S. at 428):

> * * * We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. * * *

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1962.

APPENDIX

Section 5, Title 50, Appendix, United States Code (Trading with the Enemy Act) (40 Stat. 415, as amended), provides in pertinent part:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; * * * and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision,

* * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

(3) * * * Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *

Section 500.204, Title 31, Code of Federal Regulations (1962 Supp.), provides in pertinent part:

§ 500.204 *Importation of and dealings in certain merchandise.* (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa) or North Korea. * * *

(2) Merchandise specified in this subparagraph, however processed, unless such merchandise originated in a country named as excepted for that type of merchandise and is imported directly from that country:

Type of merchandise	*Exceptions*
* * * * *	
(ii) All of the following specified types of merchandise:	
* * * * *	
Drugs, Chinese type	None

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